SUPREME COURT, U. S.

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In The Supreme Court Of The United States

October Term, 1969

No. 572

JAMES KENDALL CLANCY,

Petitioner

v.

THE FIRST NATIONAL BANK OF COLORADO SPRINGS,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

Respondent concurs in the Citation to Opinions Below set forth in Petitioner's Brief, and acknowledges that the opinion of the Referee in Bankruptcy (Appendix A -

Petitioner's Brief), the opinion of the United States District Court for the District of Colorado (Appendix B - Petitioner's Brief), and the opinion of the United States Court of Appeals for the Tenth Circuit (Appendix C - Petitioner's Brief) are each correctly set forth.

JURISDICTION

Respondent concurs in the jurisdictional statement set forth in Petitioner's Brief (Petitioner's Brief - pages 2 and 3).

QUESTIONS PRESENTED

1. Whether or not the Referee in Bankruptcy, the District Court of the District of Colorado, and the Court of Appeals of the Tenth Circuit committed error in finding and determining that Petitioner, James Kendall Clancy, was engaged in business within the meaning of Section 14c (3) of the Bankruptcy Act?

2. Whether or not the District Court and the Court of Appeals committed error in determining that the findings of fact by the Referee in Bankruptcy were "clearly erroneous", and in thereby determining that the financial statement submitted by Clancy was materially false, that his misrepresentations were inten-

tional, and that there was actual reliance by the Bank upon the false financial statement?

STATUTE INVOLVED

The Statute involved in this case is Section 14c (3) of the Bankruptcy Act (11 U.S.C.A., Section 32). Said Statute is correctly set forth in Appendix D of Petitioner's Brief.

STATEMENT OF CASE

As noted by Petitioner in his Brief, the facts in this case which were adduced at the hearing before the Referee in Bankruptcy are set forth fairly completely in the final Opinions and Orders, respectively, of the Referee in Bankruptcy (Petitioner's Brief - Appendix A), The U.S. District Court (Petitioner's Brief - Appendix B), and The Court of Appeals of the Tenth Circuit (Petitioner's Brief - Appendix C).

By way of supplement, however, Respondent states that the essential facts borne out by the record in this case are as follows:

1. On February 6th, 1967, Clancy applied to Respondent Bank for an unsecured loan in the amount of Sixteen Thousand Dollars ($16,000). Clancy had over bought

his position in the stock market and needed funds to meet a margin call. The President of Respondent Bank requested that Clancy submit a written financial statement, as such statement was required before the Bank could make an unsecured loan. Such financial statement was prepared by Clancy and submitted to Respondent Bank later on the same date. The loan transaction was consummated only after Clancy had delivered said financial statement to the Bank, and only after the President of the Bank had examined the statement.

2. In his financial statement, Clancy listed total liabilities in the amount of Sixty Nine Thousand Dollars ($69,000), when, in fact, in addition to the Sixty Nine Thousand Dollars, he was also obligated to the Central Colorado Bank, Colorado Springs, Colorado, in the amount of One Hundred Twenty Thousand Dollars ($120,000), and to the Colorado Commercial Bank, Colorado Springs, Colorado, in the amount of Thirty Thousand Dollars ($30,000). Clancy had obtained the One Hundred Twenty Thousand Dollar ($120,000) loan from the Central Colorado Bank only three days prior to his loan application to Respondent Bank. Neither of these two loans totaling One Hundred Fifty Thousand Dollars ($150,000) were in any way disclosed to Respondent Bank.

3. Clancy's testimony as to his financial condition at the time that

Respondent Bank made the unsecured loan to him is contradictory and not entirely clear from the record. It is clear, however, that he personally was insolvent, and it is uncontradicted that only thirty-two (32) days after he obtained the loan from Respondent Bank, he filed upon his oath a Petition in Voluntary Bankruptcy declaring that as of March 10, 1967, his assets totaled Three Thousand Six Hundred Fifty-Four Dollars and ninety-one cents ($3,654.91), and that his liabilities totaled Two Hundred Thirty-Seven Thousand Five Hundred Seventy-Four Dollars and twenty-seven cents ($237,574.27).

4. Contrary to the assertion of Petitioner in his Brief (Statement of the Case, page 6, and Questions Presented for Review, question No. 1, page 3) he was more than a mere speculator in the stock market. As noted in the opinion of the Referee in Bankruptcy (Petitioner's Brief - Appendix A, at page 20), "He was engaged in the trading of securities on a full-time basis and seeking his livelihood from that source." The United States District Court made the following finding in its opinion:

> "However, we agree with the Referee's decision that the Bankrupt's full-time buying and selling of securities as the sole source of his earned income constituted engaging in business under the Act." (Petitioner's Brief - Appendix

B, at page 31).

The Court of Appeals for the Tenth Circuit, in its opinion (Petioner's Brief - Appendix C, at page 39) made the following finding:

> "The determination of the Referee that the Bankrupt was engaged in 'business' within the meaning of the Bankruptcy Act was affirmed by the District Court. We believe this conclusion to be correct. The Bankrupt not only spent all of his time buying and selling stock, but he testified that he considered himself to be a 'professional trader under the rules of the S.E.C.' Every business day since December of 1965, he had been involved in stock transactions at his only office at Boettcher and Company, and these activities were his only source of income."

Each of the three tribunals that have considered this case have concluded that Petitioner was more than a mere "speculator" in the stock market. Buying and selling securities on a daily and full-time basis was Petitioner's full-time vocation and business.

ARGUMENT

I

In the instant case, Petitioner appears to rely primarily on the contention that he was not engaged in business within the meaning of Section 14c (3) of the Bankruptcy Act. With respect to this contention, the following should be noted:

1. The Referee in Bankruptcy, The United States District Court, and The Court of Appeals all concurred in finding and determining that Petitioner was engaged in business within the meaning of Section 14c (3) of the Bankruptcy Act. To determine whether or not one is engaged in business, it is necessary to examine all of the facts surrounding his activities. Each of the lower tribunals did precisely this, and unanimously concluded that Clancy was engaged in business. From an evidentiary point of view, it is respectfully submitted that there was ample evidence to sustain this unanimous finding of all three lower tribunals.

2. Respondent acknowledges that by enacting the 1960 Amendment to the Bankruptcy Act, Congress intended to distinguish between the commercial bankrupt, on the one hand, and the non-commercial bankrupt, on the other. As noted in Petitioner's Brief, at page 6 thereof, the legislative history of the 1960 Amendment under which the instant case has been decided is set

forth in Senate Report No. 1688, 86th Congress 2nd Session 1960, Volume 2, U.S. Code Congressional and Administrative News, page 2954. The essence of this Report is set forth in the opinions, respectively, of both the Referee in Bankruptcy (Petitioner's Brief - Appendix A, at page 19) and the opinion of the Court of Appeals (Petitioner's Brief - Appendix C, at page 41). Thus, it is very clear that the Court of Appeals carefully considered the legislative history of the 1960 Amendment to the Bankruptcy Act, just as it is also clear that the Court of Appeals considered the case of In Re Simms, 202 F. Supp. 911 (Eastern District, Virginia, 1962), cited by Petitioner. (See Petitioner's Brief - Appendix C, at page 41). The Simms case involved substantially different facts and is certainly not controlling in the present case.

Mr. Clancy was not merely an occasional speculator in the stock market. Rather, he was engaged in the business of buying, selling and trading in the stock market on a regular and daily basis. This was the sole activity from which he realized income, and by his own statement, he was a "professional trader under the Rules of the S.E.C."

3. Petitioner in his Brief cites several other cases, including Higgins v. Commissioner of Internal Revenue, 312 U.S. 212, 61 S. Ct. 475 (1941) and

In Re Doyle, 272 F. Supp. 35 (Southern District, New York, 1967).

The Higgins case is certainly not controlling in the instant case, as that case involved construction of a specific section of the Internal Revenue Code which was enacted for an entirely different purpose, and which had an entirely different legislative background from the Statute here under consideration.

The Doyle case is somewhat helpful in resolving the instant case, for it was there held by the District Court that the bankrupt, who was a self-employed tile-setter, was engaged in business under Section 14c (3) of the Bankruptcy Act, as amended in 1960. In the Doyle case, the Court cited the Simms case, supra, and it is very clear from a careful reading of both of these cases that they are not inconsistent with each other. The result was different simply because the factual circumstance in each case was different, even as the facts in the present case are different.

4. It is respectfully submitted that there is no conflict of decisions at the Federal District level on the question of what constitutes being "engaged in business" under Section 14c (3) of the Bankruptcy Act, nor is there any other decision in any other United States Court of Appeals which conflicts with the decision of the Court of Appeals in the present case.

Further, Petitioner submits that Petitioner has stated no sufficient reason for this Honorable Court to grant a Writ of Certiorari. Review by the Supreme Court on Writ of Certiorari is not a matter of right, and will be granted only where there are special and important reasons therefor. Rule 19 (1), Rules of The Supreme Court of the United States. Under said Rule 19, it is submitted that Petitioner has not shown sufficient cause or justification for the Supreme Court to invoke its supervisory jurisdiction to review the decision of the Court of Appeals on Certiorari.

II

As to the second question previously noted in this Reply Brief, i.e., whether or not the other findings of the Referee in Bankruptcy were "clearly erroneous", it is apparent from a careful reading of the opinion of the District Court and of the Court of Appeals that the entire record was very carefully reviewed. Both opinions go into considerable detail, and contrary to the assertion of Petitioner in his Brief (Petitioner's Brief at page 13), the Court of Appeals quite obviously did consider the question of reliance by Respondent Bank upon the false financial statement. The final paragraph of the opinion of the Court of Appeals makes it clear that the Court considered this very question. No other reasonable conclusion can be deduced from the uncontroverted

facts cited in the respective opinions of the three lower tribunals which have heard, considered and decided, this case. Respondent Bank did rely upon Clancy's false financial statement, and had the statement not been grossly deceptive, Respondent Bank would not have made the loan, and the loss by the Bank would not have been sustained.

Petitioner does not now appear to be questioning the finding that Clancy's failure to list One Hundred Fifty Thousand Dollars ($150,000) in debts on his financial statement was an intentional and materially false misrepresentation on his part. (See Petitioner's Brief - Questions Presented for Review, at page 3). Whether Petitioner is now raising this question or not, the Respondent submits that there is ample evidence in the record to sustain the findings of the District Court and the Court of Appeals to the effect that the findings of the Referee which were adverse to the Respondent Bank were clearly erroneous.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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